

1 Plaintiff, Pro Se
125 High Street
2 Newton, MA, 02464

3 UNITED STATES DISTRICT COURT
4 DISTRICT COURT OF MASSACHUSETTS_
5

6 Frederick L. Runyon, Plaintiff,) **CIVIL ACTION NO. 13-11236-DJC**
vs.)
7 Wellington Management Company,) **PLAINTIFF'S OPPOSITION TO**
8 LLP; Anne Mahoney; Stephen) **DEFENDANTS' MOTION TO DISMISS**
9 Klar; Defendants) **AMENDED COMPLAINT AS TO THE**
10) **INDIVIDUAL DEFENDANTS, PURSUANT**
11) **TO FED. R. CIV. P. 12(B)(6)**
12)
13)
14)

15 **I. Introduction**

16 Plaintiff Frederick Runyon opposes the motion to dismiss of
17 Defendants Anne Mahoney ("Mahoney") and Stephen Klar ("Klar"),
18 (collectively with co-defendant Wellington Management Company,
19 "the Defendants"). Mahoney and Klar have moved the Court under
20 Fed. R. Civ. P. 12(b)(6) to dismiss Counts III, IV, and V of the
21 Amended Complaint arguing that these counts fail to state claims
22 against the individual defendants. For the following reasons,
23 their argument is meritless and must be rejected.

24 **II. Background Facts**

25
26 Since approximately 1980, Plaintiff has worked in the field
27 of graphic design. His experience in this industry has included
28 positions with magazine and newspaper publishers, advertising

1 agencies, design studios, and corporate in-house marketing
2 communications departments. Since approximately 1995, Plaintiff
3 worked in management-level positions in the graphic design
4 industry. *First Amended Complaint ("FAC")*, ¶6.

5 In or about August 1998, Plaintiff began his employment with
6 Wellington Management Company, LLP ("the Company") as Assistant
7 Vice President, Design Manager ("Assistant Vice President"),
8 reporting to the Director of the Company's Electronic Publishing
9 Group, Joseph Kleber. At the time, he was approximately 46 years
10 old. *Id.*, ¶8.

11
12 In or about May 2003, in recognition of Plaintiff's
13 successful performance, the Company promoted him to the position
14 of Vice President. *Id.*, ¶11.

15
16 In or about September 2006, in further recognition of his
17 successful performance, the Company promoted him to the newly
18 created position of Vice President, Corporate Design Manager. As
19 part of this promotion, the Company significantly increased his
20 annual salary and expanded his responsibilities to include, among
21 other functions, supervising the design of all of the company's
22 communications materials across all forms of media, including
23 web, print, multimedia, and video. A replacement, Tom Gill, was
24 hired to fill the Design Manager position vacated by Plaintiff as
25 a result of this promotion. *Id.*, ¶12.

26
27 At all relevant times, Plaintiff was responsible for
28 overseeing all of the Company's creative design work including

1 work produced by, among other individuals: Julianna Anderson;
2 Donna DeAlmeida; Christine Green; Roseanne Hall; Lisa Hennigan;
3 Mark Kopulos; Andrew Mahoney; Kimberly Olson; Phil Sandoval; Jeff
4 St. Pierre; Wendy Scholes; and Catherine Pipes; as well as design
5 work created for video and all creative design work produced in
6 the Company's global offices. *Id.*, ¶16.

7 In or about December 2009, Anne Mahoney assumed the position
8 of Director of Marketing Services, the department in which
9 Plaintiff was employed. *Id.*, ¶¶14, 15.

10
11 On or about June 1, 2011, Plaintiff's direct supervisor,
12 Brian Johnson, called Plaintiff to an unscheduled meeting with
13 him and his direct supervisor, Director of Marketing Services
14 Mahoney, and Ms. Mahoney told Plaintiff his position had been
15 eliminated and his employment with the company was terminated.
16 *Id.*, ¶20.

17
18 At no point during this meeting did Mr. Johnson or Ms.
19 Mahoney indicate to Plaintiff that his performance was a factor
20 in the termination decision. *Id.*, ¶21.

21
22 At no point prior to his termination did Mr. Johnson or Ms.
23 Mahoney or anyone at the Company inform Plaintiff that his job
24 was in jeopardy. *Id.*, ¶22.

25
26 At no point prior to his termination was there any comment
27 or suggestion that Plaintiff was lacking skills needed to perform
28 his duties, or was not meeting management's expectations. *Id.*,
¶23.

1 At no point prior to his termination was Plaintiff provided
2 guidance regarding management's expectations of him, or offered
3 training and/or development opportunities to acquire or improve
4 skills the Company may have deemed necessary. *Id.*, ¶24.

5 Plaintiff's termination became effective on or about June
6 15, 2011. At the time of the termination, he was 59 years old.
7 *Id.*, ¶25.

8
9 The Company offered Plaintiff a separation agreement ("the
10 Agreement"), which included a severance payment in exchange for a
11 release of legal claims. The Company's Severance Policy (the
12 "Policy") sets forth eligibility requirements, which includes
13 "job elimination." The Policy sets forth a standardized formula
14 for calculating the severance amount for employees who are
15 terminated due to "job elimination." The severance amount offered
16 to Plaintiff as part of the Agreement is consistent with the
17 standardized formula set forth in the Policy. *Id.*, ¶¶29-32.

18
19 Plaintiff understood the Agreement to be non-negotiable and
20 did not attempt to modify its terms. *Id.*, ¶33.

21
22 The Company never provided Plaintiff with a list, as
23 required by law, of the other employees in his class, unit, or
24 group who were terminated in the same employment termination
25 program and were asked to sign severance agreements. *Id.*, ¶46.

26 The Agreement gave Plaintiff 21 days to consider its terms,
27 rather than 45 days as required by law. *Id.*, ¶47.
28

1 Plaintiff reasonably relied on the Company's representation
2 that his position had been eliminated in deciding to sign the
3 Agreement on or about June 14, 2011. *Id.*, ¶48.

4 Following Plaintiff's termination, the Company temporarily
5 re-assigned designers Ms. Anderson, Ms. DeAlmeida, Ms. Hennigan,
6 and Ms. Scholes to report to Mr. Johnson, and temporarily re-
7 assigned designers Mr. Kopulos and Ms. Olson to report to
8 Marketing Project Manager John Murphy. *Id.*, ¶49.

9
10 In or about October 2011, the Department hired Betsy Salsman
11 as Creative Manager. *Id.*, ¶50. The designers temporarily assigned
12 to Mr. Johnson and Mr. Murphy were permanently assigned to Ms.
13 Salsman. *Id.*, ¶67.

14
15 Ms. Salsman is approximately 20 years younger than
16 Plaintiff. Ms. Salsman's primary duties are so similar to those
17 performed by Plaintiff that they are essentially identical. *Id.*,
18 ¶¶51, 52.

19
20 According to her resume, Ms. Salsman's job history and work
21 experience are so similar to those of the Plaintiff that for
22 practical purposes they are the same. *Id.*, ¶53.

23 Ms. Salsman oversees the creative design work of the
24 individuals and other groups whose work Plaintiff supervised
25 before his termination. *Id.*, ¶54.

26
27 The Company terminated Plaintiff and/or failed to promote
28 him due to his age. If Plaintiff had known that the Company did

1 not actually eliminate his position, but had in fact replaced or
2 intended to replace Plaintiff with a younger employee to perform
3 essentially the same duties and responsibilities as he performed,
4 Plaintiff would not have signed the Agreement. *Id.*, ¶55.

5 III. Standard of Review

6
7 " 'In considering a motion to dismiss, a court must take the
8 allegations in the complaint as true and must make all reasonable
9 inferences in favor of the plaintiff.' Aronson v. Advanced Cell
10 Tech., Inc., 902 F. Supp. 2d 106, 112 (D. Mass. 2012) (quoting
11 Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993)). The court may
12 grant dismissal only if the plaintiff has failed to allege 'a
13 plausible entitlement to relief.' Bell Atl. Corp. v. Twombly, 550
14 U.S. 544, 559, 127 S. Ct. 1955, 1967, 167 L. Ed. 2d 929 (2007).
15 Accordingly, 'the complaint must include "factual content that
16 allows the court to draw the reasonable inference that the
17 defendant is liable for the misconduct alleged."' SEC v. Tambone,
18 597 F.3d 436, 442 (1st Cir. 2010) (quoting Ashcroft v. Iqbal, 556
19 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)).
20 'If the factual allegations in the complaint are too meager,
21 vague, or conclusory to remove the possibility of relief from the
22 realm of mere conjecture, the complaint is open to dismissal.'
23 *Id.*" Tutor Perini Corp. v. Banc Of America Securities Llc, Civil
24 Action No. 11-10895-NMG (D. Mass. Sept. 17, 2013).

25
26 Even where a complaint "is not a model of the careful
27 drafter's art, ... under the Federal Rules of Civil Procedure, a
28 complaint need not pin [a] plaintiff's claim for relief to a

1 precise legal theory. Rule 8(a)(2) of the Federal Rules of Civil
2 Procedure generally requires only a plausible 'short and plain'
3 statement of the plaintiff's claim, not an exposition of his
4 legal argument." Skinner v. Switzer, 131 S.Ct. 1289, 179 L. Ed.
5 2d 233, 242 (2011) (reversing and remanding dismissal of
6 plaintiff's § 1983 case), referencing 5 C. Wright & A. Miller,
7 Federal Practice & Procedure § 1219, pp. 277-278 (3d ed. 2004 and
8 Supp. 2010).

9
10 "As Ocasio-Hernández makes clear, dismissal of a complaint
11 pursuant to Rule 12(b)(6) is inappropriate if the complaint
12 satisfies the two-pronged requirement in Rule 8(a)(2) of 'a short
13 and plain statement of the claim showing that the pleader is
14 entitled to relief.' Id. at 8 (citing Fed.R.Civ.P. 8(a)(2)). As
15 to the first prong, a 'short and plain' statement 'needs only
16 enough detail to provide a defendant with "fair notice of what
17 the ... claim is and the grounds upon which it rests."' Id.
18 (quoting Twombly, 550 U.S. at 555, 127 S.Ct. 1955). However, in
19 order to satisfy the second prong of showing an entitlement to
20 relief, 'a complaint must contain enough factual material "to
21 raise a right to relief above the speculative level on the
22 assumption that all the allegations in the complaint are true
23 (even if doubtful in fact)."' Id. (quoting Twombly, 550 U.S. at
24 555, 127 S.Ct. 1955)". Sisco v. DLA Piper LLP, 833 F. Supp. 2d
25 133 - Dist. Court, D. Massachusetts 2011.

26
27 Federal Rules Of Civil Procedure, Rule 9(b) requires that
28 "...the circumstances constituting fraud or mistake shall be

1 stated with particularity.' This heightened pleading standard
 2 require[s] a plaintiff to set forth with particularity in his or
 3 her complaint, the 'who, what, when, where and how of the alleged
 4 fraud.' A plaintiff must allege with specificity the
 5 circumstances of the fraud, but need not plead all of the
 6 evidence or facts that support those allegations." United States
 7 ex rel. Rost v. Pfizer, Inc., 446 F. Supp. 2d 6, 25 (D. Mass.
 8 2006). "A plaintiff may make allegations of fraud on the basis of
 9 personal knowledge or on 'information and belief.'" United States
 10 ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 226,
 11 (1st Cir. 2004).

12 IV. Argument

13 1. Count III Adequately Alleges Fraudulent Misrepresentation 14 Against Mahoney.

15
 16
 17 The allegations in the Amended Complaint contain the "who,
 18 what, where, when, and how" of the fraud claim in Count III
 19 against Mahoney and Wellington.¹ Mahoney and Wellington (who)
 20 represented to Plaintiff that his position was being eliminated
 21 (what) when they informed him in Wellington's offices about his
 22 termination in or around June 2011 (where and when). The
 23 representation was false because he was actually replaced by
 24 Betsy Salsman, a much younger employee who performs essentially
 25 the same duties and responsibilities as he did (how), and
 26

27
 28 ¹ Plaintiff agrees that he does not have sufficient allegations
 of fraud against Klar and thus agrees to the dismissal of Count
 III against him.

1 Plaintiff knows from his experience with the company that the
2 length of time involved in the hiring process creates a
3 reasonable inference that plans to replace Plaintiff must have
4 been in progress before he was terminated. Plaintiff fails to
5 understand how his allegations could be more specific than this.

6 Defendants contend, however, that, Counts III and IV fail
7 against Mahoney because neither alleges any specific illegal
8 actions by her. Defendants imply that Plaintiff must have
9 personal knowledge of the precise actions taken by a defendant to
10 allege fraud. This is not so. "... under Rule 9(b), a plaintiff
11 may make allegations of fraud on the basis of personal knowledge
12 or on 'information and belief.'" United States ex rel. Karvelas
13 v. Melrose-Wakefield Hosp., 360 F.3d 220, 226, (1st Cir. 2004).
14 The complaint must "set forth the source of the information and
15 the reasons for the belief." Roxbury/South End Tenants' Council,
16 Inc. v. Cornerstone Corp., 573 F. Supp. 2d 359, 363 (D. Mass.
17 2008), citing Romani v. Shearson Lehman Hutton, 929 F.2d 875, 878
18 (1st Cir. 1991).

19
20
21 As Defendants concede, the amended complaint alleges the
22 source of the information – Plaintiff – and the reasons for the
23 belief – that he has personal experience in establishing new
24 positions and hiring candidates. Further, he demonstrated the
25 importance and relevance of this experience through detailed
26 allegations about the process of developing new positions and
27 hiring employees for such positions.

1 Defendants are simply wrong that Plaintiff must have
2 personal knowledge of the fraudulent act. Since he was not
3 directly involved in the creation of the new position and hiring
4 of the candidate, the Plaintiff "cannot be expected to have
5 personal knowledge of the facts constituting the fraud [and as a
6 result] the particularity requirement is satisfied if the
7 allegations are accompanied by a statement of the facts upon
8 which the belief is founded." Kuney Int'l, S.A. v. DiIanni, 746
9 F. Supp. 234, 237 (D. Mass. 1990), citing C. Wright & A. Miller,
10 Federal Practice and Procedure § 1298 & n. 95 (1969).

11 2. Count IV Adequately Alleges Interference With Plaintiff's
12 Rights Under M.G.L. c. 151B Against Mahoney and Klar.
13

14 Unlike with a heightened pleading requirement, allegations
15 of discrimination are subject to Iqbal/Twombly plausibility
16 standard. See Sisco v. DLA Piper LLP, 833 F. Supp. 2d 133, 140-
17 141 (D. Mass. 2011)
18

19 MGL 151B, Section 4 (4A) reads: "[It shall be an unlawful
20 practice:] For any person to coerce, intimidate, threaten, or
21 interfere with another person in the exercise or enjoyment of any
22 right granted or protected by this chapter...." The law does not
23 require a Complaint to include detailed descriptions of specific
24 behaviors or actions that result in the interference prohibited
25 by the law.
26

27 By its plain terms, the interference provision applies not
28 only to employers acting through their principals and agents, but

1 also to individuals as. M.G.L. c. 151B, § 4(4A) (applying to "any
2 person who aids and abets discriminatory or retaliatory conduct
3 prohibited under Chapter 151B, as well as to any person who
4 interferes with another's right to work free of unlawful
5 discrimination and retaliation." Ruffino v. State St. Bank &
6 Trust Co., 908 F. Supp. 1019, 1048 (D. Mass. 1995))

7 In Count IV and the allegations supporting it, Plaintiff has
8 alleged adequately that Department Manager Mahoney and her
9 supervisor Klar interfered with his enjoyment of rights protected
10 by G. L. c. 151B, specifically Plaintiff's right to be free of
11 age discrimination in opportunities for employment or promotion.
12 Mahoney informed Plaintiff of the decision to terminate him and
13 falsely told him his position had been eliminated. This is
14 clearly interference with Plaintiff's right under Chapter 151B to
15 be protected against age discrimination.
16

17 It is a reasonable inference that she was involved in the
18 planning to terminate Plaintiff and replace him with a younger
19 employee. Similarly, it is a reasonable inference that as
20 Mahoney's supervisor, whose approval was required, Klar also was
21 involved in the planning to terminate Plaintiff, thereby
22 interfering with Plaintiff's right under Chapter 151B to be
23 protected against age discrimination. See Bendell v. Lemax, Inc.
24 25 MDLR 106;; 2003 Mass. Comm. Discrim. LEXIS 25, 6 (March 6,
25 2003).
26

27 3. Count V Adequately Alleges Aiding and Abetting Under M.G.L.
28 c. 151B Against Mahoney and Klar.

1 Like the interference provision, aiding and abetting under
2 Chapter 151B, § 4(5) applies to individuals as well as employers.
3 When a supervisor actively assists in planning or carrying out an
4 adverse action that unlawfully discriminates under Chapter 151,
5 the supervisor may be liable for aiding and abetting.

6 The MCAD's application of the aiding and abetting provision was
7 endorsed by the Massachusetts Appeals Court in Beaupre v. Cliff
8 Smith & Associates, 50 Mass. App. Ct. 480 (2000). Beaupre found
9 that the MCAD's application was "entirely consistent with
10 traditional principles of accessory liability." Id. at 50.

11 Accessory liability holds a person "legally accountable for any
12 conduct he performs or causes to be performed in the name of the
13 corporation ... or in its behalf to the same extent as if it were
14 performed in his own name or behalf" and "makes certain that the
15 corporate agent will not escape liability because all or part of
16 his conduct is performed through or in the name of the
17 corporation." Id. "The most notable MCAD decisions in this
18 respect are Hope v. San-Ran, Inc., 8 M.D.L.R. 1195, 1210-1211
19 (1986) (supervisor who perpetrated sexual harassment of
20 terminated employee and manager who did not act on employee's
21 complaint held jointly and severally liable for their separate
22 acts of aiding and abetting the vicariously liable corporate
23 employer's illegal discrimination); Harmon v. Malden Hosp., 19
24 M.D.L.R. 157, 157-158 (1997) (opining that individuals who
25 actively perpetrate or assist in the acts forbidden by §§ 4[4],
26 4[4A], and 4[5] can be held separately liable as aiders and
27 abettors of the vicariously liable corporate employer deemed
28

1 responsible for the discrimination against the employee under
2 standard concepts of 'accessory liability')" Id., note 18.

3 Mahoney's false statement to Plaintiff that his position was
4 being eliminated when she intended to replace him with a younger
5 employee is a separate and distinct wrong from the claim that
6 Wellington terminated him due to his age. Further, it can
7 reasonably be inferred that Klar, as Mahoney's supervisor,
8 reviewed Mahoney's plan to terminate Plaintiff and gave her
9 approval to proceed. These are acts separate from Plaintiff's
10 actual termination and are properly alleged to be aiding and
11 abetting. See Harmon v. Malden Hosp., 19 M.D.L.R. 157, 157-158
12 (1997).

14 Contrary to Defendants' argument, Plaintiff alleged in the
15 amended complaint that Mahoney herself knew that she was not
16 truly eliminating Plaintiff's position, and knew that she was
17 going to replace Plaintiff with a younger employee. Since she was
18 not Plaintiff's employer, she obviously did not terminate him,
19 and thus committed a separate and distinct wrong from
20 Wellington's act of unlawful termination.

22 V. Conclusion

23 Defendants say, "...none of these counts against [Klar] can
24 survive since there is no allegation that he engaged in any
25 conduct at all, much less any that violated any of Runyon's
26 rights."
27
28

1 As the primary actor in the planning and execution of
2 Plaintiff's termination, manager and decision-maker Mahoney
3 knowingly misrepresented to Plaintiff that his position had been
4 eliminated, inducing Plaintiff to sign a waiver releasing rights,
5 as alleged in Count III; she interfered with the enjoyment of
6 Plaintiff's protected rights, as alleged in Count IV; and she
7 aided and abetted discriminatory conduct, as alleged in Count V.

8
9 It is reasonably inferred that Klar, as Mahoney's
10 supervisor, was an active participant in the planning of, and was
11 the individual who gave approval for Plaintiff's termination.
12 Klar interfered with the enjoyment of protected rights, as
13 alleged in Count IV; and he aided and abetted discriminatory
14 conduct, as alleged in Count V.

15 The facts as pleaded raise a reasonable expectation that
16 discovery will reveal evidence of illegal conduct. The details of
17 Defendants' conduct will be shown in emails and other
18 documentation between Klar, Mahoney, Human Resources, and others.
19

20 **VI. Request to Amend Complaint**

21 "Fed.R.Civ.P. 15(a) provides, inter alia, that 'a party may
22 amend his pleading once as a matter of course at any time before
23 a responsive pleading is served....' We have stated that '"[a]
24 motion to dismiss is not a 'responsive pleading' within the
25 meaning of the Rule. Neither the filing nor granting of such a
26 motion before answer terminates the right to amend; an order of
27 dismissal denying leave to amend at that state is improper....'"
28 Mayes, 729 F.2d at 607 (quoting Breier v. Northern California

1 Bowling Proprietors' Association, 316 F.2d 787, 789 (9th
2 Cir.1963)). If a complaint is dismissed for failure to state a
3 claim, leave to amend should be granted unless the court
4 determines that the allegation of other facts consistent with the
5 challenged pleading could not possibly cure the deficiency.
6 Bonanno v. Thomas, 309 F.2d 320, 322 (9th Cir.1962)." Schreiber
7 Distributing Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393,
8 (9th Cir. 1986)

9
10 If the Court finds that Plaintiffs' allegations are
11 insufficient, the appropriate remedy is amendment, not dismissal,
12 and Plaintiff respectfully asks for the Court's Approval to Amend
13 the Complaint to modify or supplement any and all claims,
14 including claims 3, 4, and 5, with sufficient factual information
15 to remedy any deficiencies, and to correct other inadequacies.

16
17
18 Dated this 7th day of May, 2014
19

20 /s/ Frederick L. Runyon

21 Frederick L. Runyon, Plaintiff

22 *Pro se*

23 125 High Street

24 Newton, MA 02464
25
26
27
28

Certificate of Service

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on May 7, 2014.

/s/ Frederick L. Runyon

Frederick L. Runyon, Plaintiff

Pro se